United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6013

ORIGINAL

To be argued by
BENEDICT GINSBERG

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

LEONE BOSURGI and EMILIO BOSURGI, etc., CHEMICAL BANK, etc., and SOCIEDAD ANONIMA DE INVERSIONES COMERCIALES E INDUSTRIALES (SAICI) and BENEDICT GINSBERG, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR BENEDICT GINSBERG PRO SE

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IN THE UNITED STATES COURT OF APPEAL
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UNITED STATES OF AMERICA,

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BRIEF FOR BENEDICT GINSBERG PRO SE

Preliminary Statement

This brief is respectfully submitted in support of the position of the undersigned, appearing pro se, that the order under review, reported in United States v. Bosurgi, 389 F.Supp. 1088 (Feb. 25, 1975), set forth in appellant's appendix (A-479-491)*, as amended by an order dated April 22, 1975 (A495-6), to the extent that it dismissed the complaint against the undersigned; granted the motion of the undersigned for summary judgment; vacated a prior order dated March 18, 1971, setting up an escrow account; and vacated the default judgment against Leone Bosurgi and Emilio Bosurgi, be affirmed.

Statement

At the request of the defendant-appellee, Chemical Bank, the parties stipulated with respect to the order in which briefs would be filed. Chemical Bank was of the opinion that if it could have the briefs of the other appellees before it

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* Numbers in parenthesis preceded by the letter A refer to pages of the Appendix for Plaintiff-Appellant.

was required to prepare its own brief, the Court would not be burdened with repetition of arguments and points. All counsel were of the same opinion. Accordingly, it was stipulated by and among all of the parties to this appeal (a) that the brief of appellee SAICI would be filed on or before August 11, 1975, (b) that the brief of appellee Ginsberg would be filed on or before August 19, 1975, (c) that the brief of appellee Chemical Bank would be filed on or before August 26, 1975, and (d) that the reply brief of the appellant The United States of America would be filed on or before September 23, 1975.

In our view the brief submitted on this appeal by the attorneys for the defendant-appellee SAICI more than adequately covers all of the issues raised by the appellant, with the possible exception of the question of the amount of the fee allowed to the undersigned in the State Court litigation. On this point, which we discuss in detail in The Facts below, the appellant concedes that the undersigned "is entitled to an attorney's lien priority (brief p. 44); that its claim is "inferior to the lien of an attorney, enforceable under state law" (brief p. 44), but that the priority is

limited "to the extent of allowing the attorney 'reasonable compensation'" (brief p. 44). The appellant is silent on the question of why the amount allowed by the State Court, on a hearing held after due notice to the United States attorney, at which there was sharp dispute as to the amount to be allowed, and in which hearing the State Court fixed a sum which was in fact less than the amount provided in this pre-litigation written retainer, was or should be considered as exceeding reasonable compensation.

The Facts

I hold the sum of $215,000 (together with the accruals thereon) as the proceeds of the settlement of an action commenced in 1966, in which I represented Leone and Emilio Bosurgi (the Bosurgis). As the trial was about to commence, the defendant therein, the defendant-appellee Chemical Bank (the Bank) agreed to pay the Bosurgis $215,000 to be deposited with me, in escrow, pursuant to a stipulation dictated on the record (A448).

It was alleged in that action, among other things,

that the Bank, who had been the custodian of stock owned by the Bosurgis, improperly and unauthorizedly used that stock as collateral for a loan that it made to third parties, whom it knew to be of questionable integrity, and against whom there were unsatisfied judgments of record; that the transaction resulted in a complete loss of the Bosurgi stock; and that after the loss had occurred, the Bank fraudulently procured the Bosurgis to execute a ratification of the Bank's prior misconduct.

The Bank's vice president who handled the transaction, admitted on his deposition, that the aforesaid use of the Bosurgi stock as collateral for the loan which the Bank made to said third parties, was without authorization, and was made solely on the oral statement of the borrower that the Bosurgis had approved it, which statement he made no effort to verify. (A270).

After numerous motions and appeals; extensive depositions in the United States and in Europe, the case came on for trial before Mr. Justice Kapelman in Supreme Court, New York County. At an all-day conference, the case was

settled for $215,000 to be paid to me, in escrow, within ten days. The Bank did not pay, and I was required to apply to Judge Kapelman for an order directing the Bank to pay the $215,000 to me.

Before that application was determined, the plaintiff-appellant herein, initiated a separate proceeding in the United States District Court to direct payment of the $215,000, in a manner different from that provided in the stipulation of settlement.

The plaintiff-appellant asserted that the $215,000 belonged to Adriana Bosurgi, the late mother of the Bosurgis, against whom the U.S.A. sought to assert a tax claim. I did not know Adriana Bosurgi, who had died some years before I was retained. She had no interest in the moneys I recovered. The action in which I recovered the money I now hold in escrow, was not initiated on her behalf; it was not based on any right or claim she ever had (A182). The money was paid in settlement of a tort claim asserted by Ardiana Bosurgi's sons personally, against the Bank. The theory of the plaintiff-appellant was that the securities which the Bank misappropriated

were part of the proceeds of what had some years earlier been a bank account in the joint names of Adriana Bosurgi, Emilio Bosurgi and Leone Bosurgi. However, the account from which the securities were taken was in the names of Emilio Bosurgi and Leone Bosurgi only; the account was the vehicle for the purchase and sale of securities for Emilio Bosurgi and Leone Bosurgi and for no one else; an enormous volume of transactions were consummated by and for Emilio and Leone Bosurgi in the years that followed Adriana Bosurgi's death, and that preceded the occurrence of the events which gave rise to the action brought by Emilio Bosurgi and Leone Bosurgi against the Bank. What the Bank fraudulently disposed of cannot be said to represent anything in which Adriana Bosurgi had an interest, nor was there any evidence whatever, indicative of such fact.

It will also be noted that until the commencement of the litigation in which I successfully obtained the sum of $215,000, there was no fund, in existence, anywhere, to which any claim could attach. Chemical Bank did not have a sum of money, the ownership of which was in dispute. Chemical Bank had had some securities, which it had dissipated, and which

were non-existent. There was no fund of any nature whatever, until the successful determination of the action which I instituted, on behalf of Leone Bosurgi and Emilio Bosurgi. (A159).

When the plaintiff-appellant made the application to restrain the Bank from paying the $215,000 to me pursuant to the stipulation settling the action in the State Court, Judge Dudley B. Bonsal denied the motion, and instead, directed the Bank to pay to me in escrow the said $215,000, with which I was to purchase a Certificate of Deposit, to be held, subject to such further order "which may be made with regard to the rights of the United States of America, or any other claimant to the said $215,000" (A33).

On appeal from Judge Bonsal's order, this Court unanimously affirmed. The Bank finally turned over the money to me, and I invested it in a Certificate of Deposit as required by Judge Bonsal's order.

The Bosurgis thereafter reconfirmed the terms of my retainer, in a letter dated August 12, 1971 (A282), which

specified, among other things, the amount then due me for services in the action.

Some time after Judge Bonsal's order the defendant-appellee SAICI instituted an action in the Supreme Court, New York County, claiming title to the moneys I had recovered for the Bosurgis on the ground that the moneys were trust funds belonging to SAICI.

SAICI moved for summary judgment in that action, and I made a cross-motion for an order fixing my fee, to be paid out of the escrow money, as per the original Bosurgi retainer (A164) and the subsequent confirmation (A282).

Copies of the papers on the motion and the cross-motion were duly served upon the attorneys for the plaintiff-appellant.

Thereafter, and following the denial of my motion in the State Court for summary judgment, for my fees, I appealed to the Appellate Division of the State Court. That Court modified the order below, and directed that my motion for summary judgment be granted to the extent of a remand, for a hearing to determine the amount of my fee (A195).

The order of the Appellate Division states:

> "...We find no impediment to this Court's determining an issue of fact competently before it regardless of peripheral Federal questions. Venitron Corp. v. Benjamin, 440 F.2d 105(2d Cir.)(cert. den.) 402, U.S. 987, 91 S.Ct. 1664, 29 L.Ed. 2d 154. And it is clearly so when the plaintiff herein has not been stayed by a Federal Court."

I thereafter duly served notice of the hearing directed by the foregoing order, upon all counsel, including the United States Attorney for this District. The hearing was held before Mr. Justice Kapelman on November 15, 1973. I testified, and placed upon the record a description of the legal services rendered by me, and stated that in my opinion, the services performed by me were of a value in excess of the contingent percentage amount provided for in my written retainer.

I also offered in evidence the letter dated August 12, 1971, that the Bosurgis had signed when I conferred with them in Europe, after I had received the $215,000 in escrow, which letter restated the terms of my retainer at 40%, and computed the amount then due thereon as my fee.

Following the hearing before Mr. Justice Kapelman, a judgment was entered on December 12, 1973 (A258), which provides in part that:

"ORDERED...that...the sum of $215,000...plus accrued interest thereon, now being held in escrow by said Benedict Ginsberg...is subject to a retaining lien...for the value of his services and...reasonable disbursements incurred in connection with the aforesaid lawsuit and...(he is) entitled to 35% of the settlement...".

The plaintiff-appellant made no application to stay the State Court action during the three years that it was pending there. After the unsuccessful attempt of the U. S. Attorney in March of 1971 to have the $215,000 turned over, otherwise than to me in escrow, he did nothing, until the first hearing before Judge Kapelman. At that point his position was merely that I should seek to have my fee fixed in the Federal Court. He did nothing further until the argument of my appeal from the order denying my application for summary judgment. At that time he addressed a letter to the Justices of the Appellate Division requesting that they deny my appeal.

Everyone now before this Court has had a full and fair opportunity to advance whatever arguments might be suggested by anyone, in opposition to the relief granted below by Judge Duffy.

I have a lien on the fund in my possession, for the services I rendered in creating the fund. The fund came into existence solely by reason of my efforts in the action by the Bosurgis against the Bank. I direct attention to the following:

(a) The lien which the plaintiff seeks to impress is sought to be impressed solely on and against a fund in my possession as the result of an action instituted approximately five years before the present action was commenced.

(b) My lien for services accrued upon the commencement of that action in 1966.

(c) My lien matured, fully, when that action was settled on September 15, 1970, long before this action was commenced.

(d) I have a statutory lien, a common law charging lien and a common law retaining lien.

(e) My lien was fixed in proceedings in the Supreme Court of the State of New York, in the Appellate Division of that Court and ultimately on remand from that Court, in the

Supreme Court. The U. S. attorney was fully informed of every step taken. He participated in some of the proceedings and attempted to participate in others, but declined to pursue the course suggested by the Court. It is time that this litigation was terminated.

POINT I

THE APPELLANT'S MISSTATEMENTS AND OTHER INAPPROPRIATE ASSERTIONS

The plaintiff-appellant's brief is replete with misstatements, cropped quotations, "factual" assertions not supported by the record, and theories and assumptions which indicate a lack of knowledge of the attorney-client relationship and of the manner in which non-governmental litigation is conducted.

We list these in the order in which they appear in the appellant's brief, which is not necessarily the order of their significance.

Misstatement No. 1

Describing the first of the "Issues Presented", the appellant's brief refers to "Adriana Bosurgi's securities account or the $215,000 proceeds thereof" (brief p. 1).

There is not and never was any such thing as an "Adriana Bosurgi's securities account". Many years before the commencement of the action against the Bank for falsely

inducing Leone and Emilio Bosurgi to ratify the unauthorized hypothecation of their securities, there had been a bank account in the joint names of "Adriana Bosurgi, Leone Bosurgi and Emilio Bosurgi" After Adriana Bosurgi's death, her sons, who were co-owners of the account, and also had a power of attorney from their mother, which, as a power coupled with an interest, survived her death (see Terwilliger v. Ontario, Carbondale & Scranton Railroad Co., 149 N.Y. 86), transferred the funds in that account into a joint account --"Leone Bosurgi and Emilio Bosurgi". They used those funds, and other funds thereafter deposited by them into that account, to buy securities, which they left with the Bank for safekeeping. Leone and Emilio Bosurgi actively traded; changing their stock portfolio from time to time; issuing instructions to the Bank to sell securities; and to buy other securities with the proceeds of such sales.

Some years later the Bank made a loan to one of its customers, who had no collateral. The Bank took as collateral for that loan, without any authorization whatever, the stock of Leone and Emilio Bosurgi, which they then held as custodians. The borrower defaulted. The Bank sold the stock to pay itself

the unpaid loan, and then the Bank fraudulently procured the Bosurgi brothers to execute a document which, as they later ascertained, was a ratification of the unauthorized use of their securities as collateral for the above loan. The $215,000 obtained in settlement of that action, cannot fairly be said to be the "proceeds" of "Adriana Bosurgi's securities account". To make such an assertion, is undoubtedly a misstatement.

Misstatement No. 2

Describing the fourth of the "Issues Presented", the appellant's brief asserts that the District Court relied on "the uncontested factual finding by the State Court", and asserts "there was evidence that the State Court proceedings were collusive against the United States". (Brief p. 2).

The fact is that the findings by the State Court were not uncontested; had they been, (a) the writer would not have been required to take an appeal from Judge Kapelman's first decision, (b) the writer would have been allowed, on the subsequent remand by the Appellate Division of the State Court, the sum fixed in the pre-litigation retainer, and

confirmed in the post-settlement retainer, rather than a substantially lesser sum.

The assertions (a) that the finding by the State Court was "uncontested", and (b) that "there was evidence that the State Court proceedings were collusive against the United States" are "factual" assertions not supportedby the record.

Misstatement No. 3

The appellant erroneously asserts that "The central factual dispute was whether the Chemical Bank securities account was owned by Adriana Bosurgi on the March 27, 1963 date of her death". (Brief p. 4).

There was never, at any time, a "securities account" with the Chemical Bank, that was "owned by Adriana Bosurgi". We have indicated under Misstatement No. 1 above, the limited nature of the interest that Adriana Bosurgi had at one time in a "three-name" account. The misstatement to which we here direct attention, is again a "factual" assertion not supported by the record.

Misstatement No. 4

The plaintiff-appellant erroneously asserts that because Judge Bonsal did not include in his order, a provision in my proposed order that "...the parties (in the State Court action) may take such proceedings therein as may be appropriate" under the State Court stipulation, "any further State Court proceedings as to the $215,000 settlement fund" was prohibited by his order. (Brief p. 9-10).

The fact that Judge Bonsal's order did not include my proposed ordering paragraph, perhaps because no application for such relief had been made in the matter before him, does not warrant the conclusion that I was "not to take any further State Court proceedings as to the $215,000". I was not stayed. Judge Bonsal's order contained no stay, nor did Judge Frankel's prior orderstay anything other than the "transferring...the $215,000 fund..." pending the application to Judge Bonsal, whose subsequent order modified the ex parte restraint to the extent of directing that the Bank pay the money to me, to be held in escrow in the manner provided in Judge Bonsal's order (A33-4). His order did not in any way stay the subsequent

proceedings to fix my fee, all of which were on notice to the plaintiff-appellant's attorneys. The misstatement to which we here direct attention is again a "factual" assertion not supported by the record.

Misstatement No. 5

Plaintiff-appellant erroneously states that after Judge Bonsal's order had been affirmed, "the posture of the Federal Court action was...that it would resolve the merits of all claims to the fund" (brief p.11) citing Judge Bonsal's order as the basis for its contention. The order contains no such provision, and in the four-year period during which proceedings were thereafter in progress in the State Court, seeking, among other things, the fixing of my fee, no such assertion was made. The various assistant U. S. attorneys who appeared in the State Court, Mr. Salzman before the Supreme Court, and Mr. Land by letter to the Appellate Division, did not suggest that the State Court had no right to fix my fee. Nor was it ever suggested, prior to the service of the plaintiff-appellant's brief to this Court, that it was only the Federal Court that had jurisdiction to fix my fee. And of course, no effort was made, at any time, to enlarge Judge Frankel's

order of March 2, 1971, or Judge Bonsal's order of March 18, 1971, to express, by implication or otherwise, that the Federal Court was the exclusive forum for fixing the fees earned in a State Court litigation.

The misstatement to which we here direct attention is an erroneous description of "the posture" of this case; based on a theory not supported by the record.

Misstatement No. 6

Plaintiff-appellant, referring (a) to my letter of June 10, 1971 to Judge Kapelman, that "I had no authority to appear for the Bosurgis in SAICI's State Court action (A355-6)", although for accuracy, it should be noted that my letter says "I have not yet received authority to appear", and (b) to my answer in the State Court verified July 17, 1971, assumes "that Ginsberg would not appear for the Bosurgis unless he had received specific authority from them to do so. Also, we must, of necessity, assume that before answering the complaint for the Bosurgis, Ginsberg communicated with them as to the specific allegations and the annexed exhibits". (Brief P. 15-16).

Neither of the plaintiff-appellant's assumptions is accurate. The answer in the State Court, which plaintiff-appellant analyzes in such detail at pages 16-17 of the brief, in the footnote at page 16, and elsewhere therein, when

correctly examined, indicates precisely why there is no basis for their assumption.

My letter of June 10, 1971, to Judge Kapelman (A355-6) states not only that "I have not yet received authority to appear" in the SAICI case, but that the papers served upon me included, among other things, "...the summons and complaint... and the affidavit in support of a warrant of attachment".

I could have refused to appear in that action; but I could not prevent SAICI from obtaining jurisidction over the fund in my possession, which they could do by obtaining a warrant of attachment. If I did not appear, SAICI, after it obtained in rem jurisdiction against the fund, by attachment, would probably be able to obtain judgment by default. If I appeared, after the attachment, and if my clients were in fact liable for the claim asserted against them, the cost of obtaining the attachment, bond premiums, and attorneys' fees would be assessed against them, and this was emphasized in SAICI's counsel's letter to me of June 2, 1971 (A396-7, A223-4).

While I had not yet received authority to appear, it was my opinion that it was essential that I should appear,

to avoid judgment by default, but that in appearing, I should make no admissions with respect to the essential allegations of the complaint, until I could confer with my clients, except as to those allegations as to which I had previously acquired knowledge in the course of the litigation against the Bank. Thus, as the plaintiff-appellant's brief correctly states (but from which it draws unwarranted and offensive assertions) I admitted (1) that the Bosurgis "have a place of residence in Italy and elsewhere" (¶2), (2) that Adriana Bosurgi was their mother, and that she died in Italy on or about March 27, 1963 (¶3)*, and (3), that in 1966 an action was instituted by the Bosurgis against the Bank, which action is described in greater detail in the SAICI complaint.

I denied "knowledge or information sufficient to form a belief..." as to every other allegation of the complaint, because I did not at that time, have sufficient knowledge. Plaintiff-appellant further erroneously described my verification

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* The Bank will not deny that they knew of Adriana Bosurgi's death a few weeks after it occurred, as appears from the letter of condolence of its vice president to Leone Bosurgi.

of the answer as "based upon information communicated to him" (brief p. 17), although the verification makes no such statement.

The misstatements to which we here direct attention are (1) an erroneous set of assertions based on lack of knowledge of the circumstances in which an attorney may verify an answer for a foreign client, (2) a lack of understanding of the limited language used in the verification of the State Court answer, and (3) the use of a "cropped" quotation from my letter to Judge Kapelman.

Misstatement No. 7

The plaintiff-appellant asserts that my answer "contested the central factual allegations of SAICI" (brief p. 17), which of course it did, for the reasons indicated above. For the brief to make that assertion is a substantial repudiation of its prior statements on that subject, described under "Misstatement No. 6".

The plaintiff-appellant is critical that "no affirmative defenses were pleaded" in the answer I interposed in

the State Court action (brief p. 17). There were none, of which I was aware, that could be pleaded. The suggestion "...that one obvious defense...was lack of subject matter jurisdiction..." (brief p. 17) is completely erroneous. The State Court, undoubtedly had jurisdiction of a fund created as the result of an action in that Court, as would any Court in which an action had been instituted and prosecuted to completion.

The misstatement to which we here direct attention is an unwarranted assumption that it would have been appropriate for me to plead defenses, which the attorneys for the plaintiff-appellant, perhaps because of their unfamiliarity with the facts, erroneously assume would have been permissible defenses.

Misstatement No. 8

The plaintiff-appellant erroneously states that "...Ginsberg, on behalf of the Bosurgis, consented to the granting of SAICI's motion (A460)", for summary judgment. (brief p. 17). I did not consent. My affidavit in opposition to the motion sets forth the information that I had received

from my clients, but there was no consent to summary judgment.

The misstatement to which we here direct attention is, again, asserting as "fact" something which does not appear in the record.

Misstatement No. 9

The plaintiff-appellant urges that my letter of September 14, 1971 to SAICI's counsel (A430) is inconsistent with my affidavit of October 20, 1971 (A459-63). (brief p. 18).

The suggested inconsistencies are (a) the letter, as plaintiff-appellant interprets it, says that I "spoke to just Leone Bosurgi" the footnote to page 16 restates the letter as saying that I said during my trip to Europe that I "spoke to just Leone Bosurgi, but his affidavit says he spoke to both Bosurgi brothers"; (b) the plaintiff-appellant then alleges as another inconsistency that my letter indicates that I "was apparently given very limited instructions", whereas my affidavit states that "I conferred with my clients", who "acknowledged to me that the obligation asserted in the complaint has not been satisfied, and that they are unable to

suggest any basis upon which they could properly request me to oppose (SAICI's) motion for summary judgment".

The plaintiff-appellant is doubly in error: (1) The word "just" is enclosed in the quotation from my letter, to create the impression that I said I had spoken only to Leone Bosurgi. The letter does not use either the word "spoke" or the word "just", both of which the plaintiff-appellant pretends to be quoting. The letter says "I conferred with Mr. Leone Bosurgi and his personal attorney" (A430); (2) the letter does not indicate whether the instructions I was given were either limited or unlimited; it does not discuss the nature or extent of the instructions, at all. Therefore, the affidavit which specifies what my clients told me, may not be regarded as inconsistent with my letter.

The mistatements to which we here direct attention are (1) distorting matter claimed to be correctly quoted, and (2) asserting as "fact", something which does not appear in the record.

Misstatement No. 10

The plaintiff-appellant then suggests that some mysterious significance must be attributed to the fact that my "August 12, 1971 conference with the Bosurgis took place a mere seven days after SAICI's counsel had written to Ginsberg (A428) requesting the Bosurgis to authenticate certain documents" (brief p. 19). I left New York, by plane, on August 11, and when I arrived at the hotel meeting place, directly from the airport, on the following morning, the people I was to meet, were already there, awaiting my arrival. I find nothing mysterious about the fact that I left New York six days after SAICI's counsel's letter of August 5, 1971 requesting authentication of the documents. The request of August 5, 1971 was not my first awareness of the documents upon which SAICI's counsel relied. The fact that SAICI had a claim against the Bosurgis, based on those documents, was brought to my attention by SAICI's counsel at the conference before Judge Kapleman on June 23, 1971 (A224, A386), in his letter of June 24, 1971, which repeated in part, statements he had made in his earlier letter of June 2, 1971 (A386).

The United States Attorney's office had received copies of these documents from SAICI's counsel on June 16, 1971 (A225). Not only I, but everybody connected with this case knew, long before the August 5, 1971 formal letter-request, that if the documents were authentic, and if SAICI had not been paid, there could be no defense to summary judgment. And, this is probably why I referred, in my affidavit of October 12, 1973 (A150-162), to my trip to Europe, two years earlier, as occurring after the motion for summary judgment had been made, instead of after I knew it would be made -- a fact I knew at least as of the time of SAICI's letters of June 2, 1971 and June 24, 1971, both of which are prior in time to the date of my trip.

The misstatement to which we here direct attention is the espousal of a theory which requires (1) that undisputed facts be disregarded (my knowledge of the nature of SAICI's claim before I left for Europe), and (2) the assumption that the refusal to employ dilatory tactics must necessarily indicate collusion.

Misstatement No. 11

Continuing to see implications where none are warranted, and where it is in fact dishonorable to suggest them, plaintiff-appellant's brief states at page 20:

> "Ginsberg represented the Bosurgis in SAICI's action, after he represented that he had no authority to appear for them in the Government's action (A. 30). In their verified answer (A. 409-411) to SAICI's complaint (A. 393-398), the Bosurgis denied the central allegations that SAICI owned the $215,000 fund and that the Bosurgis had no interest in it. They also denied any knowledge of the purported trust agreement dated December 10, 1954 bearing their signatures. Ginsberg then wrote a letter to SAICI (A. 430) saying that he conferred with Leone Bosurgi who agreed to the authenticity of certain documents including the purported December 10, 1954 trust agreement which was annexed as an exhibit to the complaint of which the Bosurgis previously professed no knowledge. Thus, either the Bosurgis lied to Ginsberg when he prepared their answer to SAICI's complaint or Leone Bosurgi lied to Ginsberg when Ginsberg subsequently conferred with him in Europe."

The most charitable view that I can ascribe to the foregoing is that the person who wrote it, has little or no experience in the private practice of law, and does not know the facts of life. I was informed by an attorney, acting for a claimant of whose existence I was not previously aware, that he had a claim against my clients; that if I did not appear voluntarily, he would proceed to obtain jurisdiction by attaching a sum of money which I was then personally holding

in escrow. I could not disburse that money, even had I decided to do so, because of the terms under which I held it, to wit, pending the resolution of questions which are still unresolved, five years later. If I had refused to appear, the claimants would get jurisdiction by attachment, and if I did not then appear, they would get judgment by default. In the circumstances, I had no alternative but to appear, and I do not think that any responsible lawyer would have done otherwise.

However, the answer which I personally verified, as the attorney for the foreign defendants, denied, as plaintiff's brief says they did, "the central allegations of the complaint", and I made such a denial because I did not, at the time of the service thereof, have any information which would permit me to do otherwise, and the answer that I verified, expressly alleges this.

I subsequently conferred in Europe, and obtained the information set forth in my letter of September 14 (A430), and in my affidavit of October 20 (A459-463). I resent the implications in plaintiff-appellant's statement, "either the Bosurgis lied to Ginsberg when he prepared their answer to SAICI's complaint, or Leone Bosurgi lied to Ginsberg when

Ginsberg subsequently conferred with him in Europe". The Bosurgis did not lie to me when I prepared the answer in the State Court action; I had no information from them, and the answer so states. Since the charge that "Leone Bosurgi lied to Ginsberg when Ginsberg subsequently conferred with him in Europe" is based on the assumption that he told me something different at an earlier time, and it is clear that the subject matter of our conference in Europe had not previously been discussed between us, it is clear that nobody lied to anybody, at any time.

The misstatement to which we here direct attention is the unwarranted assumption that because the writers of plaintiff-appellant's brief have no knowledge of attorney-client relationships, and do not understand how answers are filed by attorneys for foreign clients, they may freely accuse parties of lying, and imply that lawyers are guilty of collusion.

Misstatement No. 12

The same paragraph of plaintiff-appellant's brief that contains the matter quoted above (brief p. 20) also states:

"The Bosurgis would not appear in the federal court action. However, they were willing litigants in SAICI's state court action". * * *

"Finally, the Bosurgis were represented by Ginsberg in SAICI's state court action at the same time Ginsberg had an outstanding motion (A. 58-59) pending before Judge Lasker to vacate service of process on him because he asserted that was not authorized to represent the Bosurgis (A. 30)."

The Bosurgis would not appear in the Federal Court action because the prospect of attachment had not been suggested, and because the size of the claim which was asserted against them in the Federal Court action, was approximately five times the amount they could receive out of the moneys which I held, and the reason and the logic for appearing in the State Court action and not in the Federal Court action was that the State Court action sought only the net moneys in my possession, after my fee, and could not possibly involve a larger claim, whether or not the Bosurgis appeared personally, while the Federal Court action sought five times the money they might eventually receive out of the escrow fund, if successful.

In this context it should be noted that the SAICI action would have priority of attachment, and even if the

U. S. attorney sought a secondary warrant of attachment, if SAICI's claim was justified, as was ultimately determined, there would be nothing left for the second attachment.

The misstatement is which we here direct attention is the assertion of a theory which is (a) basically illogical, and (b) founded upon a lack of understanding of the facts of record.

Misstatement No. 13

Of a piece with plaintiff-appellant's illogical assumptions concerning the Bosurgi answer in the SAICI case, and my subsequent letter and affidavit, is the reference at page 22-3 of the brief, to Judge Kapelman's decision and opinion dated January 24, 1972. Candor should have required the writers of the brief to acknowledge that Judge Kapelman's decision of that date was unanimously reversed by the Appellate Division, upon my appeal, and that on the remand, he revised his prior position and granted my application for summary judgment, for my fees for services in the action he had previously had before him.

The misstatement to which we here direct attention is the deception which consists of relying on an interim decision known by the writers of the plaintiff-appellant's brief to have been reversed.

Misstatement No. 14

Plaintiff-appellant erroneously relies on Judge Lasker's determination (A64) as the basis for its contentions (a) that by proceeding as I did before Judge Lasker, I was trying to keep jurisdiction over the settlement money in the State Court, and (b) that I was doing so to assist SAICI. The fact is that the relief I requested before Judge Lasker, which he denied, would (had he granted it) have made the Federal Court the proper forum for the determination of my fee, because it was my contention that the State Court litigation had been concluded.

The plaintiff-appellant argues that "...at no time did the State Court obtain jurisdiction of the $215,000 fund... (but that)...SAICI hoped to secure subject matter jurisdiction over the res (the $215,000) by a 'simple stipulation' between SAICI and Ginsberg" (plaintiff-appellant's brief p. 43),

thereby implying collusion, and concludes "...the only court with jurisdiction to award Ginsberg a lien fee is the court with jurisdiction over the fund in question; and in this case, that court was the Federal Court and not the State Court". (plaintiff-appellant's brief p. 44).

The facts are the direct opposite of what plaintiff-appellant contends.

I had urged before Judge Lasker that the State Court action was no longer pending. Had I been sustained, the only court that could have fixed my fee would have been the Federal Court. It is ridiculous to suggest that I was somehow in cahoots with SAICI to confer jurisdiction over my clients in the State Court proceeding by "simple stipulation" (plaintiff-appellant's brief p. 43), when I vigorously asserted that the State Court action had been concluded, and if I had prevailed, SAICI could not have succeeded in accomplishing what plaintiff-appellant contends they accomplished.

Plaintiff-appellant's brief cites page A387 as justification for its observation at page 43, concerning SAICI's obtaining jurisdiction by a "simple stipulation between SAICI

and Ginsberg".

The observation, to put it bluntly, is dishonest. Page A387 does not contain a stipulation. It contains a letter from SAICI's counsel requesting "a simple stipulation between us governing the disbursement of the funds". I rejected that request. It is shocking to suggest "collusion" in this context.

I regard the plaintiff-appellant's brief, not only as unwarranted, but as offensive. I have no doubt that when those who wrote it, read and understand this one, they will recognize how grievously they were in error.

CONCLUSION

THE DETERMINATION BELOW, AS TO BENEDICT GINSBERG, SHOULD BE IN ALL RESPECTS AFFIRMED.

Respectfully submitted,

BENEDICT GINSBERG
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MU 3-7079

Dated: New York, N. Y.
August 12, 1975.

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

against -

LEONE BOSURGI, etal.,

Defendants-Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 14th *day of* August *19* 75 *at*
1) Gainsburg Gottlieb Levitan & Cole
2) Paul J. Curran
3) Cravath Swaine & Moore

deponent served the annexed Brief for Benedict Ginsberg Pro Se *upon*
1) 122 East 42d St, N.Y., N.Y.
2) 1 St. Andrews Plaza. N.Y., N.Y.
3) 1 Chase Manhatten Plaza, N.Y., N.Y.

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 14th
day of August *19* 75

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977